STATE OF MICHIGAN
IN THE SUPREME COURT

CAROL KRUSCHKE,

Plaintiff-Appellee,

v

JAMES R. LOVELL, M.D.,
and JAMES R. LOVELL, M.D., P.C.,

Defendant-Appellants,

and

MARQUETTE GENERAL HOSPITAL,

Defendant.
_____/

Supreme Court No: 130030

Court of Appeals No. 259601
LC No. 03-040879-NH

130030

AMICUS CURIAE BRIEF OF THE MICHIGAN TRIAL LAWYERS ASSOCIATION OF MICHIGAN

JANET M. BRANDON (P30412)
Law Office of Janet M. Brandon
Attorney for Amicus Curiae,
Michigan Trial Lawyers Association
30300 Northwestern Highway
Suite 117
Farmington Hills, Michigan 48334
(248) 855-5580, Ext. 341

FILED
JUL - 6 2006
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

RECEIVED
JUL - 6 2006
CLERK SUPREME COURT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES:

STATUTES

OTHER

INTEREST OF AMICUS CURIAE

The Michigan Trial Lawyers Association (MTLA) is an organization of Michigan Lawyers engaged primarily in litigation and trial work. Comprised of more than 2400 attorneys, the Michigan Trial Lawyers Association recognizes an obligation to assist this Court on important issues of law that would substantially effect the orderly administration of justice in the trial courts of this state. This case presents important issues of law, the resolution of which are important to medical negligence jurisprudence in this state, and which will have a direct and substantial impact on Michigan citizens/residents who are victims of negligent medical treatment but do not discover their claims until after the expiration of the ordinary two-year statute of limitations.

ARGUMENT

I. Introduction.

This Honorable Court has scheduled oral argument on the application for leave, requesting that the parties include among the issues to be addressed, the applicability of the "discovery rule" contained in MCLA 600.5838(2) to plaintiff-appellee's claim. Amicus Curiae Michigan Trial Lawyers Association agrees with plaintiff-appellee that the Court of Appeals correctly concluded that her claim was not barred by the statute of limitations and that she could avail herself of the six-month discovery rule based on the particular facts and circumstances presented. Amicus Curiae Michigan Trial Lawyers Association submits this brief for the purpose of bringing this Honorable Court's attention to alternative grounds which mandate the same outcome.

II Cases Involving Permanent Loss Or Damage To Reproductive Organs Resulting In An Inability To Procreate Are Controlled By MCLA 600.5838a(3).

The "discovery rule" as applied to malpractice actions is controlled by two separate statutes. MCLA 600.5838 governs all non medical malpractice claims. This would include claims for all licensed professionals other than those involving medical providers. Discovery claims in medical malpractice actions are governed by MCLA 600.5838a. MCLA 600.5838a is subdivided into two separate categories of cases, those to which the six-year "statute of repose" applies (section 5838a(2)), and two specially carved out areas, those involving fraud and reproductive rights, for which the discovery rule applies without time limitation (section 5838a(3)).[1] The case at bar involves a loss of a reproductive organ (i.e., the uterus by a hysterectomy) and as such is controlled by MCLA 600.5838a(3).

III The Rules Of Statutory Construction Require That Statutes Be Enforced As Written And The Correct Standard Should Be Plaintiff's Knowledge Of "The Claim" Rather Than "Any Possible Cause of Action".

The issue to be determined by this Honorable Court is whether the plaintiff could properly avail herself of the statutory discovery rule embodied in MCLA 600.5838a(3). As such, the specific statute and its language must be addressed. That subsection provides:

> "(3) An action involving a claim based on medical malpractice under circumstances described in subsection (2)(a) or (b) may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, **or within 6 months after the plaintiff discovers or should have discovered the existence of the claim**, whichever is later.

---

[1] It should be noted that the language concerning the discovery rule within the two statutes is substantially similar.

> The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commended within the time prescribed by this subsection is barred." **Emphasis supplied**

Thus, the critical focus of this analysis centers upon the phrase **"or within 6 months after the plaintiff discovers or should have discovered the existence of the claim. "** Id.

While the "discovery rule" has been addressed on many occasions, the language contained in 600.5838a(3) has not been specifically addressed or analyzed by this Honorable Court. Surprisingly, the lack of statutory analysis pervades the "leading case" associated with interpreting the discovery rule *Solowy v Oakwood Hospital*, 454 Mich 214; 561 NW2d 843 (1997). While*Solowy*, *supra,* did address the virtually identical provisions contained within 600.5838a(2), the *Solowy* court did not undertake a specific analysis of the statutory language used by the Legislature. Rather, the *Solowy* court simply adopted the standards applicable to the judicially created discovery rule which were promulgated in *Moll v Abbott Labs,* 444 Mich 1; 506 NW2d 816 (1993). *Moll, supra,* was an action involving drug product liability for which there was no specific statutory discovery rule. *Moll* adopted and created a "judicial discovery rule" for the statute of limitations in an effort to create a balance between an injured party's right to sue and a drug manufacturer's right to assert a definitive statute of limitations. In creating this "judicial discovery rule" *Moll* did an extensive analysis to determine the appropriate standard for invoking the doctrine. The Court considered many standards including the terms "likely" and "probable" but concluded

that the most equitable standard to be applied was the "possible cause of action" standard.

The Court stated:

> "When determining the appropriate standard for the discovery rule, we must keep in mind the policy reasons prompting the adoption of the statute of limitations, as well as the discovery rule and choose the interpretation that best promotes both policies and does the least amount of damage to preserve principles of law.
>
> * * *
>
> As discussed earlier, this court has adopted the discovery rule to prevent the barring of claims before the claimant's realization of a cause of action.
>
> * * *
>
> We find that the best balance is struck in the use of the "possible cause of action" standard. The standard advances the courts concern regarding preservation of a plaintiff's claim when the plaintiff is unaware of an injury or its cause, yet the standard also promotes the Legislature's concern for finality and encouraging a plaintiff to diligently pursue a cause of action. Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action. We see no need to further protect the rights of the plaintiff to pursue a claim, because the plaintiff at this point is equipped with sufficient information to protect the claim. This puts the plaintiff, whose situation at one time warranted the safe harbor of the discovery rule, on equal footing with other tort victims whose situation did not require the discovery rule's protection. This position is consistent with the jurisprudence of our state." *Id.* at 30-32 [Footnote omitted]

Thus, the standard adopted by *Solowy,* and used in the present case by both the Court of Appeals majority and dissent, is a standard based on policy and in essence, judicial legislation, while failing to address the actual statutory language used. Accordingly, we must examine the actual statute and determine the correct standard.

In examining the statutory language it is clear that the burden of proof falls on the plaintiff. Further, it is clear that a plaintiff is ultimately held to an objective "reasonable person" standard. While the statute initially provides that the plaintiff must bring a claim within 6 months "after the plaintiff discovers" (the subjective standard) it provides an alternative standard, "when the plaintiff should have discovered the existence of the claim" (the objective standard). The problem with the *Solowy* analysis and conclusion becomes obvious when the statutory language of "the claim" is juxtaposed to the *Solowy* standard of "a possible cause of action". The *Solowy* interpretation is simply not consistent with the express language used by the Legislature. *Solowy* in effect rewrote the statute and substituted its judgment for that of the Legislature.

First and foremost, the Legislature very specifically used the words "the claim". As this Honorable Court has made clear, the use of word "the" has a specific meaning. *Robinson v Detroit,* 462 Mich 439, 462; 613 NW2d 307 (2000). As stated in *Robinson:*

> "Traditionally in our law, to say nothing of our classrooms, we have recognized the differences between "the" and "a". "The" is defined as "definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an) . . . ." *Random House Webster's Collage Dictionary,* p 1382. Further, we must follow these distinctions between "a" and "the" as the Legislature has directed that all words and phrases shall be construed and understood according to the common and approved usage of the language . . . . MCL 8.3a; MSA 2.212(1). Moreover, there is no indication that the words "the" and "a" in common usage meant something different at the time this statute was enacted....
>
> Further, recognizing that "the" is a definite article, and "cause" is a singular noun, it is clear that the phrase "the proximate cause" contemplates *one* cause. Yet, meaning must also be given to the adjective "proximate" when juxtaposed between "the" and "cause" as it is here. We are

> helped by the fact that this Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." Stoll v Laubengayer, 174 Mich 701, 706; 140 NW 532 (1913). The Legislature has nowhere abrogated this, and thus we conclude that in MCLA 691.1407(2)(c); MSA 3.996(107)(2)(c) the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause." *Id.* at 462.

The word "claim" is defined in Deluxe Black's Law Dictionary, 6th Edition p 247 as follows:

> **"Claim.** To demand as one's own or as one's right; to assert; to urge; to insist. **A cause of action**. Means by or through which claimant obtains possession or enjoyment of privilege or thing. Demand for money or property as of right." **Emphasis supplied**.

Thus, the phrase chosen by the Legislature "the claim" must be given its intended meaning. The Legislature did not choose the phrase "a possible claim" nor "a likely claim" nor "a claim". The Legislature did not choose "knowledge of an injury" as the standard. Rather, the Legislature chose knowledge of "the claim". It is thus required that this Honorable Court give meaning to the Legislature's choice of the phrase "the claim". *Wickens v Oakwood Healthcare System,* 465 Mich 53, 60; 631 NW2d 702 (2001) and *Gladych v New Family Homes, Inc.,* 468 Mich 594; 664 NW2d 975 (2003). "The claim" means "the cause of action". It refers to the specific cause of action by the very words chosen. Legislative language must be given its meaning and enforced as written. *Id.*

As stated in *Wickens v Oakwood Healthcare System,* 465 Mich 53, 60; 631 NW2d 702 (2001):

> "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. ***Tryc v Michigan Veteran's Facility,* 451 Mich. 129, 135; 545 N.W.2d 642 (1996).** To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. ***People v Stone,* 463 Mich. 558, 562; 621 NW2d 702 (2001)**. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. ***Altman v Meridian Twp,* 439 Mich. 623, 635; 487 N.W.2d 155 (1992)**."

As further emphasized in *Gladych v New Family Homes, Inc.,* 468 Mich 594, 597; 664 NW2d 705 (2003):

> "When interpreting statutes, our obligation is to discern and give effect to the Legislature's intent as expressed in the statutory language. ***DiBenedetto v West Shore Hosp,* 461 Mich. 394, 402; 605 N.W.2d 300 (2000).** If the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed ---no further judicial construction is required or permitted, and the statute must be enforced as written." *Id.* "Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature." ***Pohutski v City of Allen Park,* 465 Mich. 675, 683; 641 N.W.2d 219 (2000).**

Finally as stated in *Robinson v Detroit,* 462 Mich 439, 459; 613 NW2d 307 (2002):

> "Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself. ***Carr v General Motors Corp,* 425 Mich. 313, 317; 389 NW2d 686 (1986).** Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. ***Univ of Mich. Bd of Regents v Auditor***

> ***General, 167 Mich. 444, 450; 132 N.W. 1037 (1911).*** [***27] The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. ***Detroit v Redford Twp, 253 Mich. 453, 456; 235 N.W. 217 (1931).*** Where the language if the statute is clear and unambiguous, the Court must follow it. ***City of Lansing v Lansing Twp, 356 Mich. 641, 649; 97 N.W.2d 804 (1959).***

Accordingly, the "possible cause of action" standard should be abandoned. It is a judicially created standard not in accord with the plain language of the statute. The proper statutory standard should be followed and the analysis should be of whether plaintiff-appellee knew or should have known of "the claim".

IV. Arguments Raised By The Dissent And By Defendant/Appellant Regarding Stale or Indefinite Claims Are Moot.

The Court of Appeals dissent and defendant-appellant are critical of the majority's outcome alleging that it is inappropriate to allow a particular plaintiff to wait "25 years or indefinitely" before bringing a lawsuit. The dissent argues that the majority holding would effectively render the statute of limitations meaningless. However, these concerns have been expressly addressed by the Legislature. The statute was amended in 1986 and again in 1993 adopting a solution to this "indefinite statute of limitations" problem . A "statute of repose" providing an absolute limitation of 6 years was added. Thus, the indefinite statue of limitations has been resolved. The Legislature chose finality after six years in all but two categories of claims. [2] Thus, this entire issue is moot.

---

[2] While not relevant in this particular case, it must be noted that reproductive rights cases were specifically singled out by the Legislature for treatment which would give a plaintiff an indefinite period of time to bring a case based on the discovery rule. This singling out by the Legislature of a specific cause of action for an indefinite time period to bring a discovered claim must be given meaning. It should not be judicially cast aside.

V Each Section Of The Statute Must Be Given Its Meaning And The Courts Should Avoid Construction That Would Negate Any Section Or Portion Of The Statute.

The Court of Appeals dissent and defendant-appellant urge not only a continuation of the "possible cause of action" standard but -- in essence-- an expansion of the standard to one which equates "a bad outcome" with knowledge of the claim. This expansion of the standard to "bad outcome" again ignores the express language of the statute.

The rules of statutory interpretation as set forth by this court are clear that care should be taken to avoid construction of the statutes that render any part of the statute surplusage or nugatory. *Pohutski v Allen Park,* 465 Mich 675, 683, 684; 641 NW2d 219 (2002). By adopting a standard as proposed by both the dissent and defendant-appellant, this Honorable Court would be doing precisely that. It would be setting a standard that would be so impossible to meet, that the entire section of the statute would be rendered meaningless. Clearly the Legislature, by its very words, recognized that not all claimants should be held to an absolute 2 year rule. The Legislature clearly recognized that there would be circumstances where a reasonable person would not know of their claim. To suggest that awareness of a "bad outcome" equates to awareness of "the claim" would again be a judicial rewriting of the statute to impose judicial philosophy rather than enforcement of a statute. Such an interpretation is impermissible.

VI The Malpractice Statutes Recognize That Medical Providers And Lay Persons Are Not Held To The Same Standard of Knowledge Of Medicine.

The Court of Appeals dissent speculates that it is "disingenuous and condescending" to presume that a modern woman would be "too ignorant or obsequious

to detect the possibility of wrong doing in this case". The dissent and the defendant-appellant are both proffering a standard the requires that plaintiff, as a lay person, be charged with knowledge of medicine and medical procedures equal to medical providers. This interpretation is inconsistent with the entire legislative scheme concerning medical negligence claims. Most notably the Affidavit of Merit and expert witness statutes, MCLA 600.2912d and 600.2169, permit only specifically qualified medical individuals to attest or opine that malpractice has been committed. If a plaintiff or a lay person is charged with the mandate that they should know or not know when malpractice is committed by virtue of a "bad outcome" alone, what would the statutory purpose be for Affidavits of Merit? Courts and lay persons could make findings of merit without experts based on personal knowledge rather than medical opinions. Such a scheme was not envisioned by the Legislature. Rather, the scheme chosen was one of different standards of knowledge for lay and medical persons.

The Court of Appeals majority opinion recognizes that the focus of the analysis must be on the plaintiff's knowledge or awareness of the specific claim at hand. The specific claim at hand ("the claim") was whether or not the hysterectomy was necessary. While there are obviously cases where any reasonable person should have known of the claim, the facts in this case do not rise to that level.[3] The majority opinion correctly points out that there is no evidence that the plaintiff-appellee knew that her hysterectomy was unnecessary until she had her per chance conversation with Dr. Griffin. The Court of

---

[3] For example, any reasonable person should know of "the claim" when surgery is preformed on the wrong arm or leg. By contrast in the present case, in depth medical knowledge of the signs and symptoms and medical conditions necessitating a hysterectomy is required. Such knowledge is far greater than a lay person should be duty bound to possess.

Appeals dissent and the defendant-appellant focus on plaintiffs' awareness that she had continued pain following her hysterectomy. But continued pain is often common following surgical procedures. At best it rises to the level of a "bad outcome". Continued pain in and of itself certainly would not lead any ordinarily reasonable person to believe that a procedure was unnecessary. Such a presumption would require that an ordinary person expect perfection, or at least "good" results, from every medical procedure, an assumption that no reasonable person would make. Not achieving a "perfect" or "good" result, and negligently performing a completely unnecessary procedure, are vastly different concepts in the context of medicine. *Woodard v Custer,* 473 Mich 1, 8; 702 NW2d 552 (2005); MI Civ JI 30.04. To adopt the position of the dissent or the defendant-appellant would judicially mandate that they are one in the same. Such a standard would require that every person who has a "bad outcome" or a "not perfect" result assume that their physician or hospital or health care provider is incompetent or negligent. That is a result the Legislature wished to curtail rather than encourage. More importantly, it is inconsistent with the clear language of the statute.

VII Where Reasonable Minds Can Draw Different Inferences From Undisputed Facts The Issue Is A Question For The Jury.

In the absence of undisputed facts the question of whether a cause of action is barred by the statute of limitations is generally a question of law. *Moll, supra.* However, where conflicting inferences can be supported by those facts the question is one for the jury. *DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986)*; *Winfrey v Farhat,* 382 Mich 380; 170 NW2d 34 (1969); *Kermizian v Sumcad,* 188 Mich App 690; 470 NW2d 500

(1991). The facts in this case are not disputed by the parties. However, if this Honorable Court concludes different inferences should be drawn from these facts, other than those drawn by the Court of Appeals, it would be apparent that reasonable minds differ and that a question of fact for the jury would exist. Under such circumstances the case should be remanded to the trial court for a factual determination.

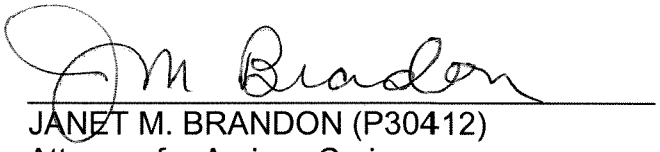
CONCLUSION

It is clear that the plaintiff-appellee meets the judicially created standard as announced in *Solowy,* that she could not have known of "a possible cause of action" as well as the statutorily prescribed standard which requires that the plaintiff have knowledge of "the claim". It is contrary to the plain meaning of the language chosen by the Legislature to require a plaintiff to be aware of the claim merely because there is a "bad" or "less than perfect" outcome. The Legislature clearly chose to have a discovery rule. The Legislature set in place a scheme allowing for claims to be filed within 6 months from their date of their discovery. This portion of the statute must be given meaning. It cannot be construed in such a way as to negate the plain meaning of the statutory language. As such, the standard to be used in this and other discovery rule cases should be properly expressed as whether or not the plaintiff should have known of the existence of "the claim". In the context of the facts in this case, the only way that a lay person could be charged with knowledge of "the claim" is if in reality we were to apply a "bad outcome" standard. While defendant-appellant may desire such a standard, the Legislature did not choose to adopt it. Accordingly, the holding of the Court of Appeals should be upheld.

RELIEF REQUESTED

Amicus Curiae Michigan Trial Lawyers Association of American respectfully requests that this Honorable Court uphold the conclusions of the Court of Appeals and articulate the correct statutory standard.

Respectfully submitted,



JANET M. BRANDON (P30412)
Attorney for Amicus Curiae,
Michigan Trial Lawyers Association
30300 Northwestern Highway
Suite 117
Farmington Hills, Michigan 48334
(248) 855-5580, Ext. 341

DATED: July 6, 2006

STATE OF MICHIGAN
IN THE SUPREME COURT

CAROL KRUSCHKE,

Plaintiff-Appellee,

v

JAMES R. LOVELL, M.D.,
and JAMES R. LOVELL, M.D., P.C.,

Defendant-Appellants,

and

MARQUETTE GENERAL HOSPITAL,

Defendant.
_____/

Supreme Court No: 130030

Court of Appeals No. 259601
LC No. 03-040879-NH

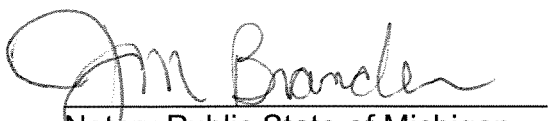
PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF OAKLAND)

Penny J. Parmentier being first duly sworn deposes and says that on July 6, 2006, two copies of MTLA's Amicus Curiae Brief was served by mailing said document in an envelope addressed to: Vincent R. Petreucelli, Attorney for Plaintiff/Appellee, 328 West Genesee Street, P.O. Box AA, Iron River, MI 49935 and Robert S. Rosemurgy, Attorney for Defendants/Appellants, P.O. Box 888, 816 Ludington Street, Escanaba, MI 49829 by depositing the same in a United States Mail receptacle located in the City of Farmington Hills, State of Michigan.

PENNY J. PARMENTIER

Subscribe and sworn to before me
this 6th day of July, 2006



Notary Public State of Michigan
County of Oakland
My commission expires: 5/19/11
Acting in County of Oakland